Chooi Siew Cheong v Lucky Height Development Sdn Bhd & Anor

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-546-92
EUSOFF CHIN CHIEF JUSTICE, MOHAMED AZMI AND CHONG SIEW FAI FCJJ
22 FEBRUARY 1995

Partnership *— Existence of partnership — Intention of parties — Definition of term 'partner' — Business in common with view of profit — Partnership Act 1961 ss 3(1) & 4*

Contract *— Construction of terms of contract — Trust — Land transferred to developer under contract — Whether held in trust for transferor if contract breached — Whether trust clause can be taken in isolation — Whether all relevant clauses must be considered — Surrounding circumstances*

Land Law *— Restraint on dealings — Prohibitory order — Removal — Whether land held in trust for beneficiary — Failure of beneficiary to lodge caveat — Knowledge of work done on land — Effect*

The appellant's father and one Lim Ching Kwui ('Lim') entered into a joint venture agreement ('the JV agreement') under which the appellant's father contributed several pieces of land and Lim was, at his own cost and expense, to subdivide the land and build terrace houses and shophouses which were to be shared between them. Lim assigned his rights under the JV agreement to the first respondent which then entered into a tripartite agreement with the appellant's father and the appellant to develop the land as earlier agreed under the JV agreement. Under the tripartite agreement, the appellant's father transferred to the first respondent its entitlement of 128 subdivided lots and to the appellant his own lots. He also transferred his rights under the JV agreement, the tripartite agreement and other supplementary agreements to the appellant absolutely. The appellant was made a permanent director of the first respondent and a signatory to all bank accounts including cheques relating to the project. The tripartite agreement also stated, inter alia, that the first respondent was deemed to hold its units in trust for the appellant ('the trust clause') and, in the event that it failed to carry out the project, it would transfer to the appellant all its units and the appellant would take over the project upon such terms as he deemed fit or, alternatively, enforce the guarantee given in respect of the project. The first respondent breached the tripartite agreement.

The second respondent had carried out works on the land for the first respondent and, after obtaining judgment for RM136,631.50, lodged a prohibitory order against certain lots of land which had already been registered under the first respondent's name. The appellant applied to set aside the prohibitory order and sought a retransfer of the land to himself. The trial judicial commissioner

dismissed the application on the grounds that since the appellant was a party to the JV agreement, he was a partner within the meaning of the term in the Partnership Act 1961 ('the Act') and the judgment obtained by the second respondent was for works done on land registered in the first respondent's name. The appellant appealed, alleging that he was not a partner within the meaning of the term in the Act and that the trust clause in the tripartite agreement meant that a trust existed in favour of the appellant in respect of the units allotted to and already transferred to the first respondent.

Held, dismissing the appeal:

(1) The term 'partnership' is defined in s 3(1) of the Act as the relationship which subsists between persons carrying on a business with a view of profit. In deciding whether a partnership exists, the court must have regard to the relevant rules in s 4 of the Act and the intention of the parties. In the instant case, each intended a wholly separate business, there was no business in common with a view of profit and, therefore, no partnership resulted from the agreement.

(2) In construing an agreement, it was not right to look at one clause in isolation. All relevant clauses in the JV agreement and the tripartite agreement had to be considered. Regard must also be had to any surrounding circumstances which might legitimately be taken into consideration. The trust clause must be considered and given its appropriate effect but it was capable of being rebutted by other provisions and on the particular facts of the case.

(3) Up to the time the prohibitory order was registered, the appellant had not taken any steps to obtain the transfer of the affected sub-lots. Also, the first respondent's large measure of freedom and the wide powers of disposal, with absolute retention of the sale proceeds without being accountable to the appellant, were incompatible with the appellant's contention that a trust was deemed to exist.

(4) The judgment obtained by the second respondent was in respect of works done on land registered in the first respondent's name and it had no knowledge of the agreement between the appellant and first respondent. The appellant could not claim to have no knowledge of the works done as he was a permanent director of the first respondent, a signatory to its cheques and involved in its affairs. Also, no caveat was lodged against the land by the appellant. Therefore, the second respondent's prohibitory order should remain.

[Bahasa Malaysia summary

Bapa perayu dan seorang yang bernama Lim Ching Kwui ('Lim') telah mengikat satu perjanjian usahasama ('perjanjian usahasama

itu') di bawah mana bapa perayu telah menyumbangkan beberapa bidang tanah dan Lim akan, dengan kos dan perbelanjaannya sendiri, memecah lot tanah itu dan membina rumah teres dan rumah kedai yang akan dibahagikan antara mereka. Lim telah menyerahhak haknya di bawah perjanjian usahasama itu kepada responden pertama yang kemudiannya mengikat satu perjanjian tiga pihak dengan bapa perayu dan perayu untuk membangunkan tanah itu sepertimana yang telah dipersetujui terlebih awal di bawah perjanjian usahasama itu. Di bawah perjanjian tiga pihak itu, bapa perayu telah memindahmilik kepada responden pertama haknya untuk mendapat sebanyak 128 lot yang telah dipecah lot dan kepada perayu lotnya sendiri. Beliau juga telah memindah haknya di bawah perjanjian usahasama itu, perjanjian tiga pihak itu dan lain-lain perjanjian tambahan kepada perayu secara mutlak. Perayu telah dilantik sebagai pengarah kekal responden pertama dan penandatangan semua akaun bank termasuk cek berkaitan dengan projek tersebut. Perjanjian tiga pihak itu juga menyatakan, antara lain, bahawa responden pertama dianggap sebagai memegang unitnya atas amanah untuk perayu ('fasal amanah itu') dan, sekiranya defendan pertama gagal meneruskan projek itu, ia akan memindahmilik kepada perayu semua unitnya dan perayu akan mengambil alih projek itu atas terma sepertimana beliau menganggap sesuai, atau sebagai pilihan lain, menguatkuasakan gerenti yang diberi berkenaan dengan projek itu. Responden pertama telah memungkiri perjanjian tiga pihak itu.

Responden kedua telah menjalankan kerja atas tanah itu untuk responden pertama dan, setelah memperolehi penghakiman untuk RM136,631.50, telah memasukkan satu perintah larangan ke atas beberapa lot tanah tertentu yang telahpun didaftar atas nama responden pertama. Perayu membuat permohonan untuk mengetepikan perintah larangan tersebut dan pindahmilik semula tanah itu kepadanya. Pesuruhjaya kehakiman perbicaraan telah menolak permohonan itu atas alasan bahawa oleh kerana perayu adalah pihak kepada perjanjian usahasama itu, beliau adalah pekongsi dalam ertikata perkataan itu dalam Akta Perkongsian 1961 ('Akta itu') dan penghakiman yang diperolehi oleh defendan kedua adalah untuk kerja yang dijalankan ke atas tanah yang didaftar atas nama responden pertama. Perayu telah membuat rayuan, dan mengatakan bahawa beliau bukanlah pekongsi dalam ertikata perkataan itu dalam Akta itu dan fasal amanah dalam perjanjian tiga pihak itu bererti wujudnya satu amanah yang memihak kepada perayu dari segi unit yang diperuntukkan dan yang telah dipindahmilik kepada responden pertama.

Diputuskan, menolak rayuan itu:

(1) Istilah 'perkongsian' didefinisikan di s 3(1) Akta itu sebagai satu perhubungan yang wujud di antara orang-orang yang menjalankan urusan bersama dengan tujuan untuk mendapat keuntungan.

Dalam menentukan sama ada satu perkongsian wujud, mahkamah perlu mengambil berat terhadap peraturan yang relevan di dalam s 4 Akta itu dan niat pihak-pihak yang terlibat. Di dalam kes ini, setiap pihak berniat menjalankan satu perniagaan yang berasingan sama sekali, tidak terdapat perniagaan yang sama dengan tujuan mendapat keuntungan dan, dengan itu, tidak ada perkongsian akibat daripada perjanjian itu.

(2) Apabila mentafsirkan sesuatu perjanjian, adalah tidak betul untuk memandang kepada satu fasal secara terpencil. Semua fasal yang relevan dalam perjanjian usahasama dan perjanjian tiga pihak itu perlu dipertimbangkan. Perhatian juga perlu diberikan kepada sebarang keadaan sekeliling yang mungkin boleh diambil kira secara sah. Fasal amanah itu harus dipertimbangkan dan diberi kesannya yang sesuai tetapi ianya boleh dipatahkan oleh peruntukan lain dan atas fakta-fakta tertentu kes ini.

(3) Sehingga takat perintah larangan itu didaftar, perayu tidak mengambil sebarang langkah untuk memperolehi pindahmilik lot berkenaan yang telah dipecah lot itu. Juga, kebebasan besar dan kuasa penjualan responden pertama, bersama dengan kuasa mutlaknya untuk menyimpan hasil kutipan penjualan tanpa bertanggungjawab kepada perayu, adalah bertentangan dengan penegasan perayu bahawa satu amanah dianggap wujud.

(4) Penghakiman yang diperolehi oleh responden kedua adalah berkaitan dengan kerja yang dijalankan atas tanah yang didaftar atas nama responden pertama dan ia tidak mengetahui tentang perjanjian di antara perayu dan responden pertama. Perayu tidak boleh mendakwa bahawa beliau tidak mengetahui tentang kerja yang dijalankan itu kerana beliau adalah pengarah kekal responden pertama, penandatangan cek dan terlibat dalam urusannya. Lagipun, tidak terdapat kaveat yang dimasukkan ke atas tanah itu oleh perayu. Dengan itu, perintah larangan yang didaftarkan oleh responden kedua seharusnya dibiarkan.]

Notes

For cases on evidence of partnership, see 10 *Mallal's Digest* (4th Ed) paras 792–795; [1992] Mallal's Digest 1351; [1993] Mallal's Digest 1059.

For cases on prohibitory orders, see 8 *Mallal's Digest* (4th Ed) paras 1778–1779; [1989] Mallal's Digest 1132; [1990] Mallal's Digest 883; [1991] Mallal's Digest 1388–1389.

Cases referred to

Barton v Fitzgerald (1812) 15 East 530 (folld)

Beckingham v Port Jackson & Manly Steamship Co [1957] SR (NSW) 403 (folld)

Chamber Colliery Co Ltd v Twyerould [1915] 1 Ch 268n (folld)

A *English v Dedham Vale Properties Ltd* [1978] 1 All ER 382; [1978] 1 WLR 93 (refd)
Karuppiah Chettiar v Subramaniam [1971] 2 MLJ 116 (distd)
Laskin v Bache & Co Inc (1971) 23 DLR (3d) 385 (distd)
Newacres Sdn Bhd v Sri Alam Sdn Bhd [1991] 3 MLJ 474 (refd)

B **Legislation referred to**

Partnership Act 1961 ss 3(1), 4

Appeal from: Originating Summons No 24–473–90 (High Court, Seremban)

C

KH Koh (*S Thilagavathy* with him) (*KH Koh Azhar & Koh*) for the appellant.
T Suresh (*Gill & Tang*) for the second respondent.

D **Chong Siew Fai FCJ** (delivering the grounds of judgment of the court): By an originating summons, the plaintiff (appellant) sought against the first and the second defendants the following relief:

(a) a declaration that the plaintiff was the lawful owner of the following 13 lots of land in the Mukim of Seremban:

E

No Hakmilik (HS/D)	PT No
12623	633/348
12632–12636	633/357–633/361
12643–12649	633/368–633/374

F (b) a declaration that the first and second defendants did not possess any interest in the said 13 lots;

(c) for an order to change or alter ('untuk mengubah') the prohibitory order dated 10 August 1990 against the said 13 lots; and

(d) for an order that the first defendant or the assistant registrar of the G court transferred the ownership of the said 13 lots to the plaintiff as the lawful owner.

After hearing counsel for both sides and considering the evidence adduced, the learned trial judicial commissioner dismissed the application. At the concluding part of his grounds of judgment, he said:

H

> In my view, the second defendant was entitled to obtain the prohibitory order in the circumstances and the plaintiff could not seek the retransfer of the land to him without first satisfying the judgment sum. Having so considered the matter, I dismissed the plaintiff's application with costs.

Against the order of dismissal the plaintiff appealed to this court.

I Having heard the appeal, we dismissed it with costs. However, since we differed with the learned judicial commissioner on the point of partnership which formed the substantial basis of his judgment, we considered it desirable to give our reasons.

Facts

Initially, the plaintiff's father was the registered owner of all that parcel of land under CT 773 Lot 633 in the Mukim of Seremban ('the parent land').

By an agreement dated 21 December 1976 entered into between the plaintiff's father, Chooi Tai Fun, and one Lim Ching Kwui ('Lim'), (hereinafter referred to as the 'joint venture agreement') the parties agreed to embark upon a joint venture project in which the plaintiff's father would contribute the parent land and Lim would, at his own entire cost and expense, convert and subdivide it into not less than 513 sub-lots, and build and complete thereon, in two phases, terrace houses and shophouses which were to be shared between the parties in the ratio of 17:83 in the first phase, and 23:77 in the second phase, all in Lim's favour. The whole project was to be completed within some three years and eight months, subject, however, to delay for certain permissible causes.

Clause 11 of the agreement requires the plaintiff's father as the registered landowner, upon being requested by Lim (developer) to charge the parent land to a bank or financial institution as security for bridging finance to be used for developing the parent land.

Under cl 8 of the agreement, Lim (developer) was, while pending the approval of conversion and layout plan, entitled to enter into sale agreements for the sale to intended purchasers of all the sub-lots that were to belong to Lim (developer), and all sale prices payable thereunder were to be paid direct to and belonged absolutely to Lim (developer) who need not account to the plaintiff's father in respect thereof. In view of the significance of the clause, I would reproduce it below:

> Pending approval of conversion and layout plans, the landowner hereby agrees that the developer has the full right and liberty to accept bookings and to enter into sale agreements with intended purchasers in respect of the developer's lots which said sale agreements shall also be executed by the landowner provided the requisite approval for subdivision and conversion has already been obtained and that the sale agreements are in respects in conformity with the provisions of r 12 of the Housing Developers (Control and Licensing) Rules 1970. Further all moneys paid or payable by purchasers on account of the purchase price in respect of the developer's lots shall absolutely belong and be payable directly to the developer who shall not have to account to the owner for all such moneys received or receivable.

Clause 12 of the agreement expressly authorized a solicitor's firm to release the separate titles respecting Lim's (developer's) lots to the banks or other financial institutions to whom the purchasers had applied for housing loans as security for the loans.

There was also a provision in the joint venture agreement permitting Lim (developer) to assign his rights and interests therein to a private limited company to be formed.

By an assignment dated 12 June 1978, Lim (developer) assigned all his interests, rights, benefits, duties and liabilities under the said agreement

dated 21 December 1976 to the first defendant company. The plaintiff's father was duly notified of the assignment.

Another agreement dated 1 July 1985 was entered into between the first defendant company of the first part, the plaintiff's father of the second part and the plaintiff of the third part. The recital to this agreement (hereinafter referred to as 'the trilateral agreement') shows, inter alia, that by 1 July 1985:

(1) approval for the conversion and subdivision of the parent land had been obtained;

(2) the numbers of units of houses, flats or buildings to be built under each of the two phases of the construction had been ascertained. In fact, the houses and flats under the first phase were 'under the closing stages of completion and pending the issue of the certificate of fitness for occupation from the relevant authorities'; and

(3) allotment of the entitlement of the plaintiff's father under the first phase of the development had been completed.

By the trilateral agreement, the plaintiff's father agreed, on execution thereof, to transfer to the first defendant company the latter's entitlement (128 lots) under the second phase. The plaintiff's father would also transfer all his units in favour of the plaintiff, and the time for completion of the agreement including the second phase of the project was 30 months from 1 July 1985 with permissible extension of a further 42 months in certain circumstances, except for certain lots, the development of which were deferred as provided in cl 4 thereof. It may be noted that the 30-month stipulation would take the agreement to 31 December 1988.

Also, by the trilateral agreement, the plaintiff's father was to 'convey transfer and assign' to the plaintiff absolutely all his rights, interests, title and benefits in the joint venture agreement, the instant agreement and certain 'supplementary agreements thereto' which were not exhibited.

The plaintiff was made a permanent director of the first defendant company but was indemnified from all liabilities incurred prior to his appointment. The plaintiff was also made a permanent signatory to all bank accounts including cheques of the first defendant company relating to the development of the housing estate.

The trilateral agreement further stated in cl 12 that the first defendant company was, until the completion and discharge of all its obligations, to be deemed to hold its units in trust for the plaintiff 'subject always to the express condition' contained in the agreement, and that in the event of the first defendant company failing, abandoning or being unable to carry on with the project, the first defendant company would be required to transfer all its units to the plaintiff, and the plaintiff would be entitled to take over the project upon such terms as he deemed fit, or alternatively, to enforce the guarantee against the guarantors. The clause runs:

> The developer shall until the completion and discharge of all its obligations to the landowner's assign hereunder to be performed including the completion

of the landowner's units (as may be certified practical completion by the developer's registered architect), be deemed to hold all the developer's units in trust for the landowner's assign subject always to the express conditions contained herein; and in the event the developer fail or are unable to carry on with the housing development or abandons the same without discharging its obligations aforesaid the developer shall be required to transfer all the developer's units to the landowner's assign and the landowner's assign shall be entitled to take over the said housing development upon such terms as he shall deem fit or alternatively the landowner's assign shall be entitled to enforce the personal guarantee against the said guarantors.

In respect of the development of the parent land and the sub-lots sold by the first defendant company, the first defendant company was to pay all taxes relating thereto and to keep the plaintiff indemnified in respect thereof (cl 18 of the trilateral agreement.)

As the matter turned out, the first defendant company failed to observe the conditions to construct the houses and was in breach.

On 29 April 1988, the second defendant company obtained a judgment in the sum of RM136,631.50 against the first defendant company in Civil Suit No 23–576 of 1986 in the High Court at Seremban for works done on the parent land for the first defendant company.

The second defendant company also said at all material times it had no knowledge of any agreement between the plaintiff and the first defendant company.

On the strength of the judgment, the second defendant/company lodged a prohibitory order dated 5 September 1988 against the following parcels of land that were amongst the lots already transferred to and registered in the name of the first defendant company:

Jenis dan No Hakmilik	Lot/PT
HS(D) 12623	633/348
HS(D) 12632	633/357
HS(D) 12633	633/358
HS(D) 12634	633/359

There is material indicating that the first defendant company was under receivership though it is not clear when exactly this took place. However, according to the notes of proceedings, the receiver and manager of the first defendant company through legal representative did appear in court on 30 October 1992 and expressed that it would not take part in the action because the lots in question had no connection with them. No judgment had been entered against the first defendant company. Neither is there any evidence suggesting the termination or rescission of the joint venture agreement.

Judgment of the High Court

The learned trial judicial commissioner dismissed the application of the plaintiff, holding that the second defendant company was entitled to lodge

A the prohibitory order and that the plaintiff could not seek a retransfer of the land to himself without first satisfying the judgment sum. He based his decision on two principal grounds:

(1) as a party to the joint venture agreement, the plaintiff was a partner within the meaning of the term in the Partnership Act 1961 ('the B Act'); and

(2) the judgment obtained by the second defendant company against the first defendant company was for works done on the land registered in the name of the first defendant company. In pursuance of the said judgment, the second defendant company entered the prohibitory C order against the said land.

Partnership

As to the finding of the learned trial judicial commissioner that the plaintiff was a partner (point (1) above), with respect, we agreed with counsel for D the plaintiff and found ourselves unable to accept. The term 'partnership' is defined as the relation which subsists between persons carrying on a business in common with a view of profit (s 3(1) of the Act). In deciding whether or not a partnership exists, the court, apart from giving regard to the relevant rules in s 4 of the Act, must consider the intentions of the E parties as appearing from the whole facts of the case and the contract they had made.

The opening sentence of rule (c) of s 4 of the Act provides: 'the receipt by a person of a share of the profits of business is prima facie evidence that he is a partner in the business'. The term 'prima facie evidence' means evidence which, if not balanced or outweighed by other F evidence, will suffice to establish a particular contention, ie that the person is a partner in the business. (See 17 *Halsbury's Laws of England* (4th Ed) at para 28.)

In the Australian case of *Beckingham v Port Jackson & Manly Steamship Co* [1957] SR (NSW) 403, even though the contract provided for the G sharing of profits and contained a reference to a joint venture, the contract was held not to evidence a partnership because the agreement as a whole indicated that the parties sought to avoid such a relationship.

In the instant case under appeal, the plaintiff (through his father who was a party to the initial agreement) provided the land and the first H defendant company was to provide capital, labour and services to develop and build on the land. With their combined resources they were to share the ultimate product in agreed proportions in that each was to take, to the exclusion of the other, certain sub-lots with or without buildings erected thereon respecting which there was to be complete freedom to deal I with or dispose of as he or it wished. In other words, each intended a wholly separate business; there was no 'business in common', ie a single business by the parties nor, it follows, 'with a view of profit' from such business. In our view, therefore, no partnership resulted from the agreement.

At the hearing of the appeal, *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474 was cited. That case, however, is no authority for the proposition that joint venturers in all joint venture agreements are partners within the Act. It dealt with the question of fiduciary relation. But the classes of cases in which a fiduciary duty has been held to exist are not closed. Thus in *English v Dedham Vale Properties Ltd* [1978] 1 All ER 382; [1978] 1 WLR 93 a fiduciary duty was held to exist between vendor and proposed purchaser of land. Slade J observed ([1978] 1 All ER 382 at p 398; [1978] 1 WLR 93 at p 110):

> I do not think that the categories of fiduciary relationships which give rise to a constructive trusteeship should be regarded as falling into a limited number of strait-jackets or as being necessarily closed.

In the Canadian case of *Laskin v Bache & Co Inc* (1971) 23 DLR (3d) 385 at p 392, Arnup JA stated:

> In my opinion, the category of cases in which fiduciary duties and obligations arise from the circumstances of the case and the relationship of the parties is no more 'closed' than the categories of negligence at common law.

While joint venturers in an undertaking may owe certain fiduciary duties to one another, the existence of such duties does not necessarily make them partners under the Act.

Trust — construction of agreements

Next, relying on cl 12 (the 'deemed-to-be-trust' clause reproduced above) of the trilateral agreement, counsel for the plaintiff submitted that there existed a trust in favour of the plaintiff respecting those units allotted to and already transferred to the first defendant company. We were of the view that in the construction of an agreement, it would not be right to look at one clause in isolation. All the other relevant clauses in the joint venture agreement and in the trilateral agreement must also be considered in the context of the whole of the transaction. Regard must also be had to any surrounding circumstances, if any, which might legitimately be taken into consideration. In *Chamber Colliery Co Ltd v Twyerould* [1915] 1 Ch 268n at p 272, Lord Watson said:

> I find nothing in this case to oust the application of the well-known rule that a deed ought to be read as a whole, in order to ascertain the true meaning of its several clauses; and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed, if that interpretation does no violence to the meaning of which they are naturally susceptible.

And, in *Barton v Fitzgerald* (1812) 15 East 530 at p 541, Lord Ellenborough CJ said:

> It is a true rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected *ex antecedentibus et consequentibus*: every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done.

A Thus, it is a matter of construction of the agreements as a whole. The 'deemed-to-be-trust' provision must, of course, be considered and given its appropriate effect, but it is capable of being rebutted by other provisions in the context of the agreements and on the particular facts of the case. Clause 8 of the joint venture agreement, which I have set out in extenso, clearly intended that the object of the payments, so far as concerning the B sub-lots allotted to the developer, was to confer absolute benefits on the developer, at least during the subsistence of the joint venture agreement which, on evidence, was never terminated.

After considering the joint venture agreement and the trilateral agreement as a whole, more particularly the above cll 8 and 12 (solicitor's C firm to release the separate titles sold by developer to purchasers' banks or financial institutions as security for loans) of the joint venture agreement, as well as the following clauses in the trilateral agreement, ie cl 1 (the transfer of the developer's 128 lots to the first defendant company, which was in fact done) and cl 18 (payment by the first D defendant company of all taxes respecting development of the parent land and the sub-lots sold), and contrasting them with cl 12 (the 'deemed-to-be-trust' provision) of the trilateral agreement, and bearing in mind that up to the time the prohibitory order was registered, no step had been taken by the plaintiff requiring the first defendant company to transfer all the sub-lots affected in this case to the plaintiff, or to terminate the agreements, E or to take over the project undertaken by the first defendant company as provided in cl 12 of the trilateral agreement, we were of the opinion that, in so far as relating to the sub-lots allocated to the first defendant company and registered in its name, the large measure of freedom and the wide powers of disposal with absolute retention of the sale proceeds without F accountability to the plaintiff vested in the first defendant company, were incompatible with the appellant's contention that a trust, free from the prohibitory order lodged by the second defendant company, was deemed, to exist by virtue of cl 12 of the trilateral agreement. It might have been otherwise if the agreements for the building project had been duly terminated before the registration of the prohibitory order. This, however, was not the G case.

Furthermore, there is unchallenged evidence from the second defendant company, that the monetary judgment dated 29 April 1988 obtained by the second defendant company was in respect of works done on the parent land registered in the name of the first defendant company H and that the second defendant company at all material times had no knowledge of the agreements between the plaintiff or its predecessor and the first defendant company. (See paras 7, 9 and 10 of the affidavit by Ong You Seng affirmed on 22 February 1991.)

Besides, it is difficult to believe that the plaintiff, being a permanent I director of the first defendant company, a mandatory signatory to the company's cheques and involved in the company's affairs since July 1985, had no knowledge of works having been done on the said land.

Also, no caveat was lodged by the plaintiff against the said land.

In our view, both in law and equity, the prohibitory order entered by the second defendant company should remain on the land register.

For the plaintiff, counsel relied on the following passage of Gill FJ in *Karuppiah Chettiar v Subramaniam* [1971] 2 MLJ 116 at p 119 col 1G:

> It seems clear from the above authorities that, by virtue of the memorandum of transfer, the respondent obtained an equitable title to the land. To put it in other words, the judgment debtor in this case, by executing a memorandum of transfer on receipt of the purchase price in full, had divested himself of all beneficial interest in the land and vested it in the respondent.

In *Karuppiah Chettiar v Subramaniam*, the registered co-owner of a piece of land sold his entire undivided share therein. The purchaser, Subramaniam, who had paid the price in full but could not obtain registration of the transfer to him because of the vendor's failure to deliver up the issue document of title, lodged a caveat to protect his claim. Subsequently, a judgment creditor, the vendor, duly obtained a prohibitory order in respect of the land and had it entered in the register. Subramaniam intervened in the execution proceedings to set aside the prohibitory order. The Federal Court, by a majority decision, held that only such beneficial interest as a judgment debtor actually possessed could be seized and sold and that since the vendor retained only a bare title to the land, the prohibitory order entered against the vendor must be set aside.

Karuppiah Chettiar v Subramaniam, in our view, is distinguishable as:

(1) in the *Karuppiah Chettiar* case, it was a sale transaction whereas in our present case it was a development project;

(2) in the *Karuppiah Chettiar* case, the sale and purchase price had been paid by the purchaser (Subramaniam) in full whereas this was not applicable in our instant case; and

(3) more importantly, the nature of the transactions as well as the terms and conditions of the agreements in the two cases were vastly at variance and called for different consideration.

For the above reasons (some of which differed from those of the learned judicial commissioner), we dismissed the appeal with costs to the second respondent (second defendant company).

Appeal dismissed.

Reported by Prof Ahmad Ibrahim